
MONEY FOR YOUR IMAGE BUT NO RECOGNITION OF
YOUR TRAUMA: LACK OF INSTITUTIONAL ACCOUNTABILITY
FOR ATHLETICS PERSONNEL ACCUSED OF SEXUAL
MISCONDUCT

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* J.D. Candidate, Elon University School of Law, December 2022. I would like to thank my friends, family, and Professor Steven I. Friedland for all their support, encouragement, and assistance during the writing of this note. Further, I recognize sexual assault is a heavy subject and can occur across all genders. However, this article primarily discusses allegations of male athletes or coaches committing violence against women due to the more voluminous number of publicized cases with this dynamic. Additionally, the discussion of an individual athlete's name, image, and likeness compensation in no way suggests or reflects their own involvement in any wrongdoing. Lastly, I want to sincerely thank the brave survivors in each of the cases discussed for sharing their stories.

I. INTRODUCTION

The elevated status surrounding athletics personnel¹ hinders accountability and transparency regarding sexual assault. Within college athletics, sexual assault is rampant.² Institutions investigate athletes for sexual assault more frequently than non-athletes.³ One in four athletes report being abused by an authority figure.⁴ Team doctors have abused numerous athletes across their careers.⁵ And coaches sometimes enabled cultures conducive to sexual violence.⁶ Despite multiple scandals spanning decades,⁷ the National Collegiate Athletic Association ("NCAA") has not implemented an association-wide, enforceable rule explicitly prohibiting sexual misconduct by athletes or coaches.⁸ Thus,

¹As used in this article, "athletics personnel" refers to both athletes and athletics staff, including coaches, athletic trainers, administrators, and any other college employees involved in athletics.

²See Kenny Jacoby, *College Athletes More Likely to be Disciplined for Sex Assault*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-athletes-more-likely-disciplined-sex-assault/4379153002/> (last updated Dec. 16, 2019, 12:10 PM); Kenny Jacoby, *NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/> (last updated Dec. 16, 2019, 12:06 PM); Blake Schuster, *1 in 4 College Athletes in Survey Say They Were Sexually Abused by an Authority Figure*, BLEACHER REPORT (Aug. 26, 2021), <https://bleacherreport.com/articles/10011139-1-in-4-college-athletes-in-survey-say-they-were-sexually-abused-by-authority-figure>.

³Jacoby, *College Athletes More Likely to be Disciplined for Sex Assault*, *supra* note 2.

⁴Schuster, *supra* note 2.

⁵See *Who is Larry Nassar?: A Timeline of His Decades-Long Career, Sexual Assault Convictions and Prison Sentences*, USA TODAY, <https://www.usatoday.com/pages/interactives/larry-nassar-timeline/> (last visited Dec. 31, 2022); Jon Wertheim, *Why Aren't More People Talking About the Ohio State Sex Abuse Scandal?*, SPORTS ILLUSTRATED (Oct. 5, 2020), <https://www.si.com/college/2020/10/05/ohio-state-sex-abuse-daily-cover>.

⁶See John Barr, *Louisville Recruits Told NCAA About Sex, Stripper Parties*, ESPN (Mar. 11, 2016), https://www.espn.com/espn/otl/story/_/id/14951432/three-former-louisville-basketball-recruits-told-ncaa-investigators-attended-stripper-parties-had-sex-them; Davis Potter, *New Baylor Lawsuit Alleges 52 Acts of Rape by 31 Football Players, "Show 'em a Good Time" Culture*, OXFORD EAGLE (Jan. 27, 2017, 6:09 PM), <https://www.oxfordeagle.com/2017/01/27/new-baylor-lawsuit-alleges-52-acts-of-rape-by-31-football-players-show-em-a-good-time-culture/>.

⁷*E.g.*, *Who is Larry Nassar?*, *supra* note 5; Wertheim, *supra* note 5.

⁸Aaron Hernandez, *Step One: Solving the NCAA Sexual Assault Problem*, 32 MARQ. SPORTS L. REV. 157, 170–71 (2021). The organization's sexual assault policy requires certain administrators to attest to Title IX compliance, education, and fulfillment of annual disclosures, as well as take reasonable steps to confirm that the annual disclosures are correct. *NCAA Board of Governors Policy on Campus Sexual Violence*, NCAA 2–3 (revised

only individual institutions can enforce disciplinary procedures, investigations, and punishment for responsible persons (assuming no criminal charges are filed), creating accountability for their misconduct.⁹

However, institutions cannot guarantee accountability either. Complaints and investigations against athletics personnel are often delayed, riddled with bias, or dismissed.¹⁰ When star quarterback Jameis Winston was accused of raping a fellow student at Florida State University in January 2013, athletics officials did not report the allegation to campus officials because "police were no longer investigating the matter."¹¹ The institution would not get involved until approximately ten months later, and it eventually cleared Winston of responsibility in December 2015—after he led the school to a National Championship, won the Heisman Trophy, and was drafted by the Tampa Bay Buccaneers in the first round.¹² As will be discussed in detail below, the University of North Carolina at Chapel Hill broke its own rules when investigating a rape allegation against linebacker Allen Artis.¹³ Additionally, as alleged in a recent federal lawsuit, although three female athletes accused University of Texas Women's Cross Country and High Jumping coach John Rembao of sexual abuse, university officials purportedly ignored their complaints.¹⁴ The university's lawyer allegedly told one athlete that the school found no misconduct by Rembao and led others to believe they had no claim against the

Apr. 27, 2021), https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf. The required annual disclosures require each athlete to report whether they were investigated, found responsible, or criminally charged for an act of sexual or domestic violence. *Id.* at 2. It does not directly address individual penalties for athletes from the NCAA for sexual misconduct, but an institution can punish an athlete for failure to fully disclose relevant information or not completing the disclosure. *Id.*

⁹ See DUFFY LAW LLC, TITLE IX, SEXUAL ASSAULT, CONDUCT CODE VIOLATIONS, DUE PROCESS, AND UNIVERSITY DISCIPLINE PROCEEDINGS: A COMPREHENSIVE GUIDE FOR STUDENTS AND PARENTS (2022), <https://www.duffylawct.com/wp-content/uploads/2020/08/THE-GUIDE-2020-Duffy-Law-LLC.pdf>.

¹⁰ See, e.g., Catalina Kelly, Note, *NCAA: No Consequences Against Athletes*, 50 LOY. L.A. L. REV. 793, 795–98 (2017).

¹¹ *Id.* at 795–96.

¹² *Id.* at 796.

¹³ *Student Criticizes UNC-CH for Handling of Rape Allegation*, WRAL, <https://www.wral.com/student-criticizes-unc-ch-for-handling-of-rape-allegation/16011391/> (last updated Sept. 14, 2016, 10:35 AM).

¹⁴ See First Amended Complaint at 5–7, 34–60, *Aldrich v. Nat'l Collegiate Athletic Ass'n*, 484 F. Supp. 3d (N.D. Cal. 2020) (No. 20-CV-01733).

institution for his conduct.¹⁵ Rembao continued coaching at multiple schools allegedly without any discipline.¹⁶ The case was dropped in July 2022 when the parties reached a private agreement.¹⁷

Institutional avenues for accountability are dictated by Title IX, a federal law prohibiting sex-based discrimination.¹⁸ Title IX currently recognizes sexual assault as a form of sexual harassment.¹⁹ The law outlines a school's response to a complaint of sexual harassment²⁰ and grievance process for formal complaints,²¹ as well as prohibits retaliation against complainants.²² If a school does not comply with Title IX's mandates, the Department of Education, through its Office for Civil Rights, can institute multiple penalties, including withdrawal of federal funding from the institution.²³ Notwithstanding this grant of power, the Department of Education has never pulled federal funding from a school for failure to comply with Title IX.²⁴ Therefore, institutions have little incentive to cure their procedural misconduct when investigating athletics personnel.²⁵

Such procedural misconduct exists as part of a culture within college athletics that values silence and protectionism for athletics personnel over the well-being of victims to protect the school's brand.²⁶

¹⁵ *Id.* at 48, 58.

¹⁶ *Id.* at 8.

¹⁷ Claire Stevens, *Class Action Lawsuit Claiming Sexual Abuse, Harassment by Former UT Track Coach Dropped*, DAILY TEXAN (July 25, 2022), <https://thedailytexan.com/2022/07/25/class-action-lawsuit-claiming-sexual-abuse-harassment-by-former-ut-track-coach-dropped/>.

¹⁸ Hillary Hunter, Comment, *Strike Three: Calling out College Officials for Sexual Assault on Campus*, 50 TEX. TECH L. REV. 277, 282–84 (2018).

¹⁹ 34 C.F.R. § 106.30(a) (Sexual Harassment) (2022).

²⁰ 34 C.F.R. § 106.44(a) (2022).

²¹ 34 C.F.R. § 106.45 (2022).

²² 34 C.F.R. § 106.71(a) (2022).

²³ See Jayma M. Meyer, *It's on the NCAA: A Playbook for Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 364 (2017).

²⁴ *Id.*

²⁵ See *id.* at 364–67.

²⁶ Kate Fagan, *Athletic Departments Handling Sexual Assault Cases: Never a Good Idea*, ESPN (Aug. 21, 2014), https://www.espn.com/espnw/news-commentary/story/_/id/11386174/why-athletic-departments-clueless-handling-sexual-assaults; see also Heather Dinich, *Seven Women Sue LSU, Allege Violations in How Title IX Complaints Were Handled*, ESPN (Apr. 26, 2021), https://www.espn.com/college-sports/story/_/id/31340786/seven-women-sue-lsu-allege-violations-how-title-ix-complaints-were-handled; Paula Lavigne & Nicole Noren, *Athletes, Assaults and Inaction*, ESPN (Aug. 20,

With the ever-increasing status of athletes and coaches, colleges and universities have heightened incentive to shield athletics personnel from internal discipline. Monetary investments in athletics and recent developments in the law have made athletes and coaches alike into greater celebrities.²⁷ The NCAA pockets increasingly more money each year broadcasting college sports,²⁸ society invests thousands in sporting events,²⁹ and universities invest millions in coaches leading successful programs.³⁰ Additionally, college athletes may now receive unlimited academic benefits from their schools, including full scholarships, private tutors, and paid internships.³¹ With the new ability to profit from their name, image, and likeness ("NIL"), athletes now make millions on their own brands, too,³² providing more media attention to themselves and their institutions.³³

2014), https://www.espn.com/espn/otl/story/_/id/11381416/missouri-tulsa-southern-idaho-face-allegations-did-not-investigate-title-ix-cases.

²⁷ See discussion *infra* Section IID.

²⁸ See Christina Gough, *Revenue of the NCAA from Television Broadcast Payments and Licensing Rights from 2010 to 2025*, STATISTA (Mar. 1, 2021), <https://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement/>.

²⁹ See, e.g., Zac Al-Khateeb, *UNC v. Kansas Ticket Prices: How Much Do Seats Cost for 2022 NCAA Tournament Championship Game?*, SPORTING NEWS (Apr. 4, 2022), <https://www.sportingnews.com/us/ncaa-basketball/news/unc-kansas-ticket%20prices-2022-ncaa-tournament-championship/alvxozbpvyrpgjrj5jlx9fcf>. One ticket to the 2022 NCAA Championship game could cost up to \$40,365. *Id.*; see also *CFP National Championship Tickets*, TICKETSMARTER, <https://www.ticketSMARTER.com/college-football-playoff-national-championship> (last visited Dec. 31, 2022). "The average ticket price for the CFP National Championship is usually in a range between \$2,000 and \$3,400." *Id.*

³⁰ See Charlotte Gibson, *Who's Highest Paid in Your State?*, ESPN, https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees (last visited Dec. 31, 2022).

³¹ Kwanghyuk David Yoo, *SCOTUS Analysis: NCAA v. Alston*, EMORY L. NEWS CTR. (Aug. 2, 2021), <https://law.emory.edu/news-and-events/releases/2021/08/scotus-yoo-ncaa-v-alston.html>.

³² George Malone, *Biggest NIL Deals in College Sports*, GOBANKINGRATES (Mar. 16, 2022), <https://www.gobankingrates.com/net-worth/sports/biggest-nil-deals-in-college-sports/>.

³³ See Lee Feinswog, *LSU Gymnast Olivia Dunne Has Landed Some of the Biggest NIL Deals in the Country*, 225 MAG. (Jan. 5, 2022), <https://www.225batonrouge.com/our-city/lsu-gymnast-olivia-dunne-landed-biggest-nil-deals-country>.

However, after a sexual assault scandal, schools often lose money in legal fees³⁴ and settlements,³⁵ and student applications decline due to the negative press surrounding the story.³⁶ Additionally, an institution's multi-million dollar athletic program could suffer from the suspension or expulsion of a star athlete or coach, resulting in lost athletics profits as well.³⁷ Thus, with heightened media attention in the wake of NIL, institutions have increased motivation to protect athletes and others accused of sexual misconduct to avoid public criticism and lost profits,³⁸ especially if a star athlete is sponsored by a large company with millions invested in the player. As a result, NIL is exacerbating the silence and protectionism surrounding college athletics that allows athletes and coaches to avoid equal and opposite accountability for their misconduct.³⁹

Due to an institution's incentive to protect its own brand, schools need a better process to handle sexual assault complaints that ensures unbiased investigations, fair outcomes, and accountability for responsible persons. Current Title IX regulations are not enough because they allow institutions to control complaint investigations and hearings,⁴⁰

³⁴ *Eg.*, Kara Berg, *How Much Michigan State Has Paid in Wake of Larry Nassar Scandal*, LANSING STATE J. (Sept. 8, 2021, 10:00 PM), <https://www.lansingstatejournal.com/story/news/2021/09/09/michigan-state-university-legal-fees-larry-nassar-scandal/8215414002/>.

³⁵ *Id.*; *More Settlements Reached Over College Athlete Sex Abuse Scandals*, LEGAL EXAM'R (May 26, 2022), <https://www.legalexaminer.com/editors-pick/more-settlements-reached-over-college-athlete-sex-abuse-scandals/>.

³⁶ *Eg.*, Paula Lavigne & Nicole Noren, *Applications to Michigan State Drop After Nassar, Sexual Assault Scandals*, ESPN, https://www.espn.com/espn/otl/story/_/id/25430618/applications-michigan-state-university-drop-larry-nassar-sexual-assault-scandals-espn-lines (last updated Dec. 4, 2018, 9:56 AM).

³⁷ *See, e.g.*, Patrick Rishe, *Penn State Sex Scandal Will Rock University's Stature and Paterno's Legacy*, FORBES (Nov. 7, 2011, 11:15 AM), <https://www.forbes.com/sites/prishe/2011/11/07/penn-state-sex-scandal-will-rock-universitys-paterno-s-stature/?sh=488979eb3d8f>; Mike Ozanian, *Penn State Football's Economic Fallout*, FORBES (Nov. 11, 2011, 8:34 AM), <https://www.forbes.com/sites/mikeozanian/2011/11/11/penn-state-football-s-economic-fallout/?sh=23456842fb33>.

³⁸ *See* Kelly, *supra* note 10, at 802–04.

³⁹ *See, e.g.*, Paula Lavigne, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 12, 2015), https://www.espn.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges; Fagan, *supra* note 26.

⁴⁰ *See* 34 C.F.R. §§ 106.44–45 (2022); *see also* Kelly Rice, Comment, *Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-*

and schools largely police themselves for conformity with the law unless the OCR conducts a compliance review or receives a discrimination complaint.⁴¹ Therefore, the Department of Education should bolster the law by providing a more stringent investigative process and create a system to check institutional compliance.

This article proceeds in three parts. Part II provides background on (A) sexual assault within athletics, (B) institutional failures processing reports of misconduct, (C) Title IX and its outlined requirements for processing complaints, and (D) the celebrity status of athletes and coaches that hinders institutional transparency and accountability and provides further institutional incentive to conceal allegations of wrongdoing. Part III proposes two solutions to increase institutional accountability in processing complaints against athletics personnel: (A) amend Title IX regulations to require a legal team to process all sexual misconduct reports, and (B) impose a three-strikes policy for institutions that violate Title IX during sexual assault proceedings. Part IV concludes.

II. BACKGROUND

A. Rampant Sexual Assault

College athletic programs hide numerous sexual assaults with little to no consequences for abusers.⁴² Sexual assault is already prevalent on college campuses, with one in five women reporting that they were sexually assaulted while in college.⁴³ Inside athletics, the frequency increases. Athletes are accused of misconduct at higher rates than nonathletes,⁴⁴ and one out of every four athletes has suffered sexual abuse from persons in authority on campus, with

Campus Sexual Assault Claims, 67 DEPAUL L. REV. 763, 780–81 (2018) (“Title IX gives colleges the ability to govern the lifespan of a sexual assault complaint.”).

⁴¹ See *About OCR*, DEP’T OF EDUC. OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified July 13, 2022).

⁴² See Fagan, *supra* note 26; Lavigne & Noren, *supra* note 26.

⁴³ *Sexual Assault on College Campuses*, OFF. ON WOMEN’S HEALTH, <https://www.women-shealth.gov/relationships-and-safety/sexual-assault-and-rape/college-sexual-assault> (last updated Feb. 15, 2021).

⁴⁴ See Paula Lavigne, *College Athletes Three Times More Likely to be Named in Title IX Sexual Misconduct Complaints*, ESPN (Nov. 1, 2018), https://www.espn.com/espn/otl/story/_/id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints.

coaches as the most frequently named perpetrator.⁴⁵ Further, coaches and other athletic staff sometimes foster sexually violent cultures within their programs.⁴⁶ Thus, college athletics hosts a runaway culture of sexual misconduct.

Athletes are more frequently involved in sexual misconduct investigations than nonathletes.⁴⁷ From 2014–2019, athletes were disciplined for sexual misconduct "at more than three times the rate of the general student population."⁴⁸ In a recent inquiry, athletes at participating schools constituted less than 3% of the overall student population but were found responsible for almost 9% of all sexual assaults.⁴⁹ Among those penalized, schools reprimanded football players the most, "account[ing] for more than 6% of those found responsible" despite comprising "less than 1% of the overall student population at the schools with football teams"⁵⁰ Such high numbers can, in part, be attributed to toxic masculinity within athletic programs, where male athletes objectify women and see them as "powerless commodities to be conquered."⁵¹ Many male athletes also feel like the "big man" on campus and are used to getting what they want.⁵² Thus, men's college sports are intrinsically linked to rape culture.⁵³

Further, athletes are often sexual assault survivors themselves.⁵⁴ One in four collegiate athletes report being sexually abused by an authority figure, accusing coaches most often as their abusers.⁵⁵ However, this number likely does not reflect all athletes that have suffered

⁴⁵ Schuster, *supra* note 2.

⁴⁶ See, e.g., Barr, *supra* note 6; Potter, *supra* note 6.

⁴⁷ Jacoby, *College Athletes More Likely to be Disciplined for Sex Assault*, *supra* note 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ DeWitt Scott, *Dismantling Rape Culture in College Athletics*, INSIDE HIGHER ED (June 9, 2017), <https://www.insidehighered.com/advice/2017/06/09/male-athletes-need-be-educated-about-sexual-assault-essay>.

⁵² Jacoby, *NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On*, *supra* note 2.

⁵³ *Rape Culture*, BRANDON UNIV., <https://www.brandonu.ca/sexualviolence/education-prevention/rape-culture/> (last visited Dec. 31, 2022) (defining "rape culture as a complex set of beliefs that encourage male sexual aggression and supports violence against women. . . . In a rape culture both men and women assume that sexual violence is a fact of life, inevitable.").

⁵⁴ Schuster, *supra* note 2.

⁵⁵ *Id.*

from abuse as many sexual assaults go unreported,⁵⁶ and many athletes fear losing their scholarships or playing opportunities if they report their coach.⁵⁷

Additionally, coaches sometimes foster and promote cultures of sexual violence toward women within their programs. From 2010–2014, Andre McGee, a former assistant coach at the University of Louisville, enlisted Katina Powell to throw sex parties for Louisville athletes and recruits.⁵⁸ Powell provided strippers and prostitutes for such parties and received payment from McGee.⁵⁹ Louisville's program provided nearly two dozen sex parties across the four-year span.⁶⁰ Further, Art Briles, former football coach at Baylor University, "implemented a 'show 'em a good time' policy . . . [that used] sex to attract recruits."⁶¹ The "policy" included arranging for women to have sex with potential players and taking recruits to strip clubs.⁶² These programs objectified women for athletic success while continuously engraining rape culture into men's sports.

B. Institutional Failures Processing Complaints

Many sexual assault complaints against athletics personnel are mishandled by institutions.⁶³ Cases against athletes are often riddled

⁵⁶ Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported>. "[N]early 80 percent of rapes and sexual assaults go unreported . . ." *Id.*

⁵⁷ Schuster, *supra* note 2.

⁵⁸ Shannon Cogan, *Katina Powell Details How She Planned 22 Parties with Andre McGee*, WAVE, <https://www.wave3.com/story/35729068/katina-powell-details-how-she-planned-22-parties-with-andre-mcgee/> (last updated June 30, 2017, 6:48 PM).

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ Potter, *supra* note 6.

⁶² Brandon Gray, *Lawsuit: Baylor Coaching Staff Used Sex to Help Recruit Players*, KCEN-TV, <https://www.kcentv.com/article/news/local/lawsuit-baylor-coaching-staff-used-sex-to-help-recruit-players/500-394013091> (last updated Jan. 27, 2017, 7:31 PM).

⁶³ *See, e.g.*, Max Olson & The Athletic Staff, *NCAA: Baylor's Mishandling of Sexual Violence Cases Did Not Constitute Violation*, THE ATHLETIC (Aug. 11, 2021, 4:49 PM), <https://theathletic.com/news/ncaa-baylors-mishandling-of-sexual-violence-cases-did-not-constitute-violation/LwZF8xRsLnZy/>; Ellen J. Staurowsky, *LSU Officials Accused of Mishandling Sexual Assault Cases Involving Athletes & Non-Athletes*, SPORTS LITIG. ALERT (Dec. 18, 2020), <https://sportslitigationalert.com/lsu-officials-accused-of-mishandling-sexual-assault-cases-involving-athletes-non-athletes/>.

with bias towards the athlete⁶⁴ or lack meaningful discipline.⁶⁵ Additionally, complaints against coaches and doctors have gone unanswered or ignored, allowing the staff to continue their abuse.⁶⁶ Therefore, schools struggle to impose accountability on athletics personnel due to their own procedural failures.

Some investigations are biased in favor of the accused athlete.⁶⁷ For example, in 2016, Delaney Robinson accused Allen Artis, a linebacker on the University of North Carolina Chapel Hill football team, of raping her.⁶⁸ Six months later, the school allegedly had not taken any action.⁶⁹ Investigators in the case supported Artis throughout the process, comforted him when he grew upset, joked about how many girls' phone numbers he received on the night of the alleged incident, and told him not to worry but to "just keep on living your life and playing football."⁷⁰ Meanwhile, the school's "Title IX office . . . violated its own rules . . . by trying to obtain Robinson's blood-alcohol content and by reviewing her victim impact statement before a decision had been made."⁷¹ The Title IX office and school administrators later absolved Artis of responsibility.⁷²

In other instances, even if a school finds an athlete responsible, they may face little to no consequences.⁷³ In 2014, Manny Padilla

⁶⁴ See Hernandez, *supra* note 8, at 162–65; see also A.J. Perez, *North Carolina's Allen Artis, Accused of Sexual Assault, Turns Himself in*, USA TODAY (Sept. 14, 2016, 12:02 PM), <https://www.usatoday.com/story/sports/ncaaf/acc/2016/09/14/north-carolina-allen-artis-accused-of-sexual-assault-turns-himself/90351338/>.

⁶⁵ See Priya Desai & Jenny Vrentas, *A Predatory Culture, a Viral Reckoning—And Now What?*, SPORTS ILLUSTRATED (Sept. 30, 2021), <https://www.si.com/college/2021/09/30/usf-mens-soccer-sexual-assault-and-harassment-reckoning-daily-cover>.

⁶⁶ See, e.g., Dave Bennett, *Ten Years After the Sandusky Scandal, What did Penn State—and the Nation—Learn?*, L.A. TIMES (Nov. 5, 2021, 4:00 AM), <https://www.latimes.com/sports/story/2021-11-05/what-penn-state-learned-from-jerry-sandusky-10-years-later>; Wertheim, *supra* note 5.

⁶⁷ See Hernandez, *supra* note 8, at 162–65; see also Perez, *supra* note 64.

⁶⁸ Perez, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Student Criticizes UNC-CH for Handling of Rape Allegation*, *supra* note 13.

⁷² *UNC Football Player Eligible for Reinstatement After Sex Charges Dropped*, WRAL, <https://www.wral.com/sex-charges-dropped-against-suspended-unc-football-player/16793491/> (last updated June 29, 2017, 8:06 PM).

⁷³ See, e.g., Desai & Vrentas, *supra* note 65.

joined the men's soccer team at the University of San Francisco.⁷⁴ One year later, he asked Julia Casciano to meet him in his dorm "to talk."⁷⁵ He tried to talk her into having sex with him, and, after she denied him over ten times, he "stuck his hand up her shirt and down her pants, 'feeling [her] up."⁷⁶ Casciano reported the incident to the school.⁷⁷ Two months later, the school found Padilla responsible for sexual misconduct.⁷⁸ Padilla received probation and a deferred suspension—meaning he only faced suspension "if he committed another offense."⁷⁹ He continued playing soccer, never missed a game, and remained on campus.⁸⁰ Meanwhile, Casciano withdrew from a course after failing a midterm and later transferred to a different university in order to finish her college career.⁸¹ Padilla later allegedly assaulted another student but faced no consequences because the school did not respond to the online report of the incident.⁸²

Team trainers have also avoided liability for their actions despite schools receiving reports of their misconduct.⁸³ San Jose State University recently found athletic trainer Scott Shaw responsible of sexually abusing nearly a dozen athletes after the institution conducted a new investigation against him.⁸⁴ The university initially investigated Shaw in 2009 after seventeen female swimmers alleged Shaw touched them inappropriately during treatment, "massaging their breasts and pelvic areas when they sought treatment for other parts of their bodies."⁸⁵ However, the school found no misconduct and did not discipline

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *E.g.*, Kenny Jacoby & Rachel Axon, *San Jose State Reinvestigates Claims Athletic Trainer Inappropriately Touched Swimmers*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2020/04/17/san-jose-state-reinvestigates-trainer-claims-sexual-misconduct/5138353002/> (last updated Apr. 17, 2020, 1:48 PM).

⁸⁴ Kenny Jacoby & Rachel Axon, *Former San Jose State Trainer Scott Shaw Charged with Sexually Assaulting Student Athletes*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2022/03/10/fbi-charges-former-san-jose-state-athletic-trainer-scott-shaw-sexual-assault/6992466001/> (last updated Mar. 11, 2022, 1:26 AM).

⁸⁵ Jacoby & Axon, *supra* note 83.

Shaw, allowing him to continue treating and abusing athletes.⁸⁶ The university reopened the case against Shaw in 2019 after the swimming coach disseminated a 300-page document describing allegations against the trainer over the last decade and the school's response (or lack thereof).⁸⁷ The Civil Rights Division of the Department of Justice "found San Jose State violated Title IX for more than a decade," due to its dismissal of claims and protection of Shaw—despite multiple abuse allegations.⁸⁸

Further, some colleges shielded coaches from accountability to promote their athletics programs.⁸⁹ Jerry Sandusky, former assistant football coach at Pennsylvania State University, was convicted of forty-five counts of child sexual abuse in 2012.⁹⁰ Following his conviction, the FBI investigated the university and found that, among others, long-time head football coach Joe Paterno and university President Graham Spanier "had actively concealed the allegations against Sandusky to protect the football program."⁹¹ Other university officials served jail time due to their concealing allegations against Sandusky.⁹² Ten years later, the university continues to suffer in the public eye as the scandal is still discussed among the state college system.⁹³

C. Title IX and Its Current Requirements

Title IX serves as an avenue of relief for survivors of campus sexual assault if an institution mishandles their complaint.⁹⁴ It is a federal law prohibiting sex-based discrimination in all federally-funded educational programs and activities.⁹⁵ All colleges that receive federal funding from the Department of Education must abide by Title IX.⁹⁶ Originally enacted by Congress in 1972, the law now recognizes sexual violence and harassment as a form of sex-based discrimination.⁹⁷ The

⁸⁶ Jacoby & Axon, *supra* note 84.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *E.g.*, Bennett, *supra* note 66.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.*

⁹⁴ Hunter, *supra* note 18, at 284–86.

⁹⁵ *Id.* at 282–83.

⁹⁶ Meyer, *supra* note 23, at 364.

⁹⁷ Hunter, *supra* note 18, at 283–84.

Department of Education provides guidance on the law's application and enforces the regulations through the Office for Civil Rights ("OCR").⁹⁸ If a school does not comply with the regulations, the Department can, among other penalties, withdraw the institution's federal funding.⁹⁹ However, the Department has never issued this penalty for Title IX violations.¹⁰⁰

In 2020, the Department of Education issued new regulations detailing the law's definitions, changing grievance processes, and altering reporting requirements for sexual misconduct complaints.¹⁰¹ First, the law requires all institutions to identify a Title IX Coordinator who is primarily responsible for all discrimination reports.¹⁰² Further, a postsecondary institution must respond to a sexual assault allegation when it obtains actual knowledge of the claim.¹⁰³ "Actual knowledge" is defined as "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient."¹⁰⁴ Once an institution receives actual knowledge of a sexual assault, it has a duty to act "promptly in a manner that is not deliberately indifferent."¹⁰⁵ "A [school's response] is deliberately indifferent only if . . . clearly unreasonable in light of the known circumstances."¹⁰⁶ The institution must treat both the accuser and the accused (whether student, faculty, or staff) equally, offer supportive measures¹⁰⁷ to both parties, and, if a formal complaint is filed, follow a specific investigative process.¹⁰⁸

⁹⁸ *Title IX and Sex Discrimination*, DEP'T OF EDUC. OFF. FOR C.R., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Aug. 20, 2021).

⁹⁹ See Meyer, *supra* note 23, at 364.

¹⁰⁰ *Id.*

¹⁰¹ Kathleen Conn, *Salvaging and Separating the 2020 Title IX Regulations*, 386 ED. L. REP. 557, 557, 562–64 (2021).

¹⁰² 34 C.F.R. § 106.8(a) (2022).

¹⁰³ 34 C.F.R. § 106.44(a) (2022).

¹⁰⁴ 34 C.F.R. § 106.30(a) (Actual Knowledge) (2022).

¹⁰⁵ § 106.44(a).

¹⁰⁶ *Id.*

¹⁰⁷ Supportive measures are free, individualized services offered to either party for protection and support, including but not limited to counseling, class adjustments, campus escort services, and housing alternatives. § 106.30(a) (Supportive Measures).

¹⁰⁸ § 106.44(a)–(b).

After obtaining knowledge of the complaint through the initial report, the Title IX Coordinator must contact the reporting student as soon as possible to offer guidance on supportive measures and the process for filing a formal complaint.¹⁰⁹ Generally, the reporting student chooses whether to file a formal complaint, but the Title IX Coordinator may file one on the student's behalf under certain circumstances.¹¹⁰ If a student chooses only to file a report of the incident, the case does not move beyond the complainant's wishes for supportive measures.¹¹¹ However, if the student chooses to file a formal complaint, a prescribed grievance process begins.¹¹²

At a minimum, schools must follow the grievance process outlined in the Federal Regulations upon receiving a formal complaint.¹¹³ Schools may add procedures to the prescribed process as they see fit, so long as the additional requirements "apply equally to both parties."¹¹⁴ The process must: (1) remain impartial at all times;¹¹⁵ (2) include a presumption of innocence for the accused;¹¹⁶ (3) provide written notice to all parties that includes the details (as known) serving as the basis for the allegation and formal complaint, a statement of presumed innocence, the right to examine evidence and obtain an advisor during the proceedings, and any applicable prohibition against making false statements;¹¹⁷ and (4) refrain from imposing any sanction on the accused until a formal finding of responsibility.¹¹⁸

The institution must investigate the allegations and provide both parties an opportunity to present witnesses and relevant evidence.¹¹⁹

¹⁰⁹ § 106.44(a).

¹¹⁰ *See id.*; § 106.30(a) (Formal Complaint). For example, a Title IX Coordinator may file a formal complaint if it receives notice that an employee is continuously harassing students, even if the students do not want to file a complaint or be involved in the investigatory process. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT (JULY 2021) 15 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.

¹¹¹ *See* § 106.44.

¹¹² § 106.44(b).

¹¹³ 34 C.F.R. § 106.45(b) (2022).

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ § 106.45(b)(1)(iv).

¹¹⁷ § 106.45(b)(2)(i).

¹¹⁸ § 106.45(b)(1)(i).

¹¹⁹ § 106.45(b)(5)(ii).

The school cannot restrict a party's ability to discuss the allegations,¹²⁰ and it does not require a limit on contact between parties while the investigation is ongoing.¹²¹ The parties may choose to have an advisor accompany them to any meeting during the proceedings and must have the opportunity to review all evidence collected.¹²² There must be a live hearing that includes the opportunity to cross-examine all witnesses.¹²³ Those making the final determination of responsibility cannot include the Title IX Coordinator or any investigators already involved in the case.¹²⁴ However, if the accused party is no longer enrolled at the school while the investigation is ongoing, the institution may dismiss the complaint and cease its investigation.¹²⁵ Lastly, the regulations do not include an explicit timeline to complete an investigation.¹²⁶

D. Rising Celebrity Culture Hinders Transparency and Accountability

However, despite such detailed requirements for processing sexual misconduct complaints, the culture within athletic departments often promotes athletics and protecting the school's brand over a victim's wellbeing.¹²⁷ And the ever-increasing celebrity status of athletes and coaches exacerbates this problem, further hindering institutional transparency and accountability within disciplinary proceedings when an athlete or coach is accused of sexual misconduct. The extortionate amount of money surrounding athletics lifts athletes and coaches to a celebrity status that will continue to rise as long as investments are made in the institution and individual athletes and coaches.¹²⁸ But after a sexual assault scandal, institutions face vast criticism in the

¹²⁰ § 106.45(b)(5)(iii).

¹²¹ *See id.*

¹²² § 106.45(b)(5)(iv), (vi).

¹²³ § 106.45(b)(6)(i).

¹²⁴ § 106.45(b)(7)(i).

¹²⁵ § 106.45(b)(3)(ii).

¹²⁶ § 106.45(b)(1)(v) (providing only for "reasonably prompt time frames for conclusion of the grievance process").

¹²⁷ Fagan, *supra* note 26; *see also, e.g.*, Alexa Terribilini, *The Athletic God Complex: The Title IX Lawsuit Against Baylor University and How the Government Responds*, 26 JEFFREY S. MOORAD SPORTS L.J. 439, 442 (2019).

¹²⁸ Will Tamplin, *It's Time to Address the Money Driven Culture of Sports*, THE HOYA (Mar. 27, 2009), <https://thehoya.com/its-time-to-address-the-money-driven-culture-of-sports/>.

public eye.¹²⁹ Applications frequently drop,¹³⁰ and donations may decrease.¹³¹ Further, schools lose money in legal fees and settlements from accompanying lawsuits.¹³² And athletic teams may suffer on and off the field from the suspension or expulsion of an athlete or coach, resulting in more lost funds for the institution.¹³³ As a result, some colleges will actively conceal allegations to protect their athletic programs and public image.¹³⁴ With the addition of NIL and increased media attention on athletes, schools now have further incentive to shield athletes and staff from misconduct allegations, promoting the distorted culture within athletics that prides athletic success over support for sexual assault survivors.¹³⁵

Billions of dollars are invested in and earned through college athletics each year.¹³⁶ Fans not only spend thousands of dollars on tickets to sporting events,¹³⁷ but they also invest in memorabilia, travel, and other related expenses. The NCAA, as the governing body for college athletics, continuously makes more money through its streaming contracts, reaching \$827 million in 2020 and \$850 million in 2021.¹³⁸ Meanwhile, NCAA member institutions produced \$18.9 billion of revenue from their athletic departments in 2019.¹³⁹ Local sports stores sell jerseys from big-name players, and many general stores will sell some form of memorabilia in support of local colleges and universities.

¹²⁹ See, e.g., Caroline Kitchener & Alia Wong, *The Moral Catastrophe at Michigan State*, THE ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/>.

¹³⁰ Lavigne & Noren, *supra* note 36.

¹³¹ Cara Newlon, *After Campus Rape Allegations, Some Alums Deny Donations*, FORBES (June 16, 2014, 2:16 PM), <https://www.forbes.com/sites/caranewlon/2014/06/16/after-campus-rape-allegations-some-alums-deny-donations/?sh=4c197d876295>.

¹³² Eg., Berg, *supra* note 34; *More Settlements Reached Over College Athlete Abuse Scandals*, *supra* note 35.

¹³³ See, e.g., Rische, *supra* note 37; Ozanian, *supra* note 37.

¹³⁴ Eg., Kelly, *supra* note 10, at 802–04; Bennett, *supra* note 66; Lavigne & Noren, *supra* note 26.

¹³⁵ Fagan, *supra* note 26; Kelly, *supra* note 10, at 803–04.

¹³⁶ Felix Richter, *U.S. College Sports are a Billion Dollar Game*, STATISTA (July 2, 2021), <https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/>; Kendall Baker, *Inside the World of College Sports Financing*, AXIOS (Mar. 11, 2020), <https://www.axios.com/2020/03/11/college-sports-financing-student-tuition-costs>.

¹³⁷ See Al-Khateeb, *supra* note 29; *CFP National Championship Tickets*, *supra* note 29.

¹³⁸ Gough, *supra* note 28.

¹³⁹ Richter, *supra* note 136.

Further, schools invest tremendous amounts of money into college coaches,¹⁴⁰ elevating their status above others on campus. Men's basketball and football coaches often earn more money than anyone else in their respective states with public salaries.¹⁴¹ For example, a study from the 2018–2019 basketball and 2019 football seasons found that Nick Saban, head football coach at the University of Alabama, earned an \$8.9 million salary, while the state governor only made \$120,400.¹⁴² Further, Tony Bennett, head men's basketball coach at the University of Virginia, earned \$4.2 million, while former Virginia governor Ralph Northam made less than \$200,000.¹⁴³ Thus, college coaches enjoy an elevated status within society fueled by high investments in their positions.

Additionally, recent changes in the law and NCAA policy poured more money into college athletics, creating a celebrity status for star athletes. First, the United States Supreme Court opened the door for more student-athlete benefits in June 2021 with its decision in *National Collegiate Athletic Association v. Alston*.¹⁴⁴ The Court upheld a district court ruling that NCAA policies limiting academic benefits to athletes violated anti-trust principles.¹⁴⁵ As a result, athletes can now receive unlimited academic benefits, including post-eligibility scholarships, paid internships, tutors, and study abroad scholarships, among other academic benefits that a student could possibly need during college.¹⁴⁶ Coaches can now use this as a recruiting advantage, offering more benefits to entice prospective athletes to join their teams.¹⁴⁷ Thus, recruits can use the promise of academic benefits to bargain with their top schools in order to receive not only the best athletic opportunities but educational experiences as well.

¹⁴⁰ Gibson, *supra* note 30.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See* 141 S. Ct. 2141 (2021).

¹⁴⁵ *Id.* at 2154–66.

¹⁴⁶ Yoo, *supra* note 31.

¹⁴⁷ *See* Alex Kirshner, *The NCAA's Supreme Court Blowout is a Sign of Things to Come*, MEN'S J., <https://www.mensjournal.com/sports/ncaa-v-alston/> (last visited Dec. 31, 2022).

Next, the NCAA adopted a new policy allowing athletes to profit off their name, image, and likeness ("NIL").¹⁴⁸ This new policy allows student-athletes to make sponsorship or endorsement deals and run their own businesses endorsing their brand.¹⁴⁹ Athletes may also hire professional agents to seek new deals.¹⁵⁰ The policy took effect on July 1, 2021, and states soon adopted legislation providing guidance on NIL activities.¹⁵¹ However, NIL has quickly changed the landscape of college athletics,¹⁵² bringing an even higher status to college athletes and providing more motivation for schools to shield athletics personnel from misconduct allegations.

While most athletes make moderate amounts for their NIL,¹⁵³ top players receive exorbitant amounts of money. Bryce Young, a rising sophomore at Alabama in 2021, earned almost \$1 million before starting his first game.¹⁵⁴ That number has increased as the now junior recently signed endorsement deals with multiple companies, including BMW of Tuscaloosa, raising his NIL value to roughly \$3.2 million.¹⁵⁵ Additionally, Olivia Dunne, a gymnast at Louisiana State University, earned over \$1 million in the first year of NIL and signed sponsorship

¹⁴⁸ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

¹⁴⁹ See All Things Considered, *NIL Contracts Are Changing the Landscape of All Collegiate Sports*, NPR (Mar. 28, 2022, 4:52 PM), <https://www.npr.org/2022/03/28/1089311065/nil-contracts-are-changing-the-landscape-of-all-collegiate-sports>; Sandra Feldman, *College Athlete Entrepreneurs: What You Need to Know About Your LLC or Corporation*, WOLTERS KLUWER (Aug. 25, 2021), <https://www.wolterskluwer.com/en/expert-insights/college-athlete-entrepreneurs-what-you-need-to-know-about-your-llc-or-corporation>.

¹⁵⁰ Hosick, *supra* note 148.

¹⁵¹ Theresa Loscalzo & Monica Matias, *Legal Framework for NIL One Year After NCAA v. Alston – Next Steps for Universities*, JDSUPRA (May 11, 2022), <https://www.jdsupra.com/legalnews/legal-framework-for-nil-one-year-after-6571507/>.

¹⁵² See *id.*

¹⁵³ *Male Athletes Lead Way in NIL Money, According to Third-Party Data*, ESPN (Jan. 27, 2022), https://www.espn.com/college-sports/story/_/id/33160929/male-athletes-lead-way-nil-money-per-data ("Average compensation across all three divisions . . . was \$1,291 overall through Dec[ember] 31, with a median compensation of just \$51.").

¹⁵⁴ Joe Grobeck, *Bryce Young was Almost a Millionaire Before He Started a Game for Alabama*, FANBUZZ, <https://fanbuzz.com/college-football/sec/alabama/bryce-young-nil/> (last updated June 25, 2022).

¹⁵⁵ Pete Nakos, *NIL Deals of the Week: Decoldest Crawford Goes Viral, Bryce Young Inks Two Deals*, ON3 (Aug. 18, 2022), <https://www.on3.com/nil/news/nil-deals-partnerships-decoldest-crawford-bryce-young-dollar-shave-club-viral-tv-ad/>.

deals with American Eagle, Vuori Clothing, and Bartleby.¹⁵⁶ Dunne currently has the highest NIL valuation among female athletes, resting at \$2.3 million.¹⁵⁷ Further, Paige Bueckers, a now junior women's basketball player at the University of Connecticut, has a valuation at \$816,000, signing deals with Gatorade, Crocs, and Bose.¹⁵⁸

NIL is transforming recruiting and transfers as well. An unnamed high school football senior recently signed a deal worth up to \$8 million before committing to a particular college.¹⁵⁹ Quinn Ewers, now a football player at the University of Texas, left high school a year early for a \$14 million deal to sign autographs for GT Sports Marketing.¹⁶⁰ Also, Miami men's basketball player Isaiah Wong threatened to enter the transfer portal if he did not receive higher NIL compensation.¹⁶¹ As NIL progresses, college athletes will continue making exorbitant deals and receiving national media attention, creating a near-instant celebrity status for sponsored star athletes.

With the rise of NIL deals and increased funding for athletic programs, the heightened status of athletes and coaches interferes with transparency and accountability in institutional disciplinary processes for misconduct. Successful athletic programs serve as major advertising for colleges and help increase applications at universities.¹⁶²

¹⁵⁶ See Feinswog, *supra* note 33.

¹⁵⁷ *LSU's Olivia Dunne Has Highest NIL Valuation Among Female College Athletes*, BUS. REP. (Oct. 7, 2022), <https://www.businessreport.com/business/lsus-olivia-dunne-has-highest-nil-valuation-among-female-college-athletes>.

¹⁵⁸ Pete Nakos, *Where Women Rank in On3 NIL 100*, ON3 (Oct. 4, 2022), <https://www.on3.com/nil/news/where-women-rank-in-on3-nil-100-sedona-prince-flaujae-johnson-cavinder-twins-valuations/>.

¹⁵⁹ Scooby Axson, *2023 Five-Star Recruit Signs NIL Collective That Could Net More Than \$8 Million*, USA TODAY, <https://www.usatoday.com/story/sports/ncaaf/2022/03/12/five-star-recruit-signs-8-million-nil-deal-largest/7014601001/> (last updated Mar. 13, 2022, 11:22 AM).

¹⁶⁰ Malone, *supra* note 32; Colin Gay, *Former Ohio State QB Quinn Ewers Begins Texas Football Career with Two Touchdowns*, COLUMBUS DISPATCH (Sept. 4, 2022, 12:04 AM), <https://www.dispatch.com/story/sports/college/football/2022/09/04/quinn-ewers-debuts-texas-after-transfer-from-ohio-state/65472442007/>.

¹⁶¹ Jonathan Givony & Jeff Borzello, *NIL Agent Says Miami Hoops Star Isaiah Wong Will Enter Transfer Portal if NIL Compensation Isn't Increased*, ESPN (Apr. 28, 2022), https://www.espn.com/mens-college-basketball/story/_/id/33823826/nil-agent-says-miami-hoops-star-isaiah-wong-enter-transfer-portal-nil-compensation-increased.

¹⁶² See Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <https://www.forbes.com/sites/hbsworking-knowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/?sh=15620e7d6e96>.

However, once sexual misconduct allegations surface, the institution suffers in the public eye. Penn State's applications dropped by 10.5% in the year following the Sandusky scandal.¹⁶³ Additionally, after the Larry Nassar trial and conviction, applications also decreased at Michigan State University despite its long-recognized pedigree.¹⁶⁴ Applications dropped by 8.3%, which one national college admissions spokesperson partially attributed to students' and parents' concerns regarding the culture of the school.¹⁶⁵ As enrollment numbers drop, schools receive less money.¹⁶⁶ Further, once a scandal breaks, schools often pay millions in legal fees and settlements from accompanying lawsuits.¹⁶⁷ For example, Michigan State University paid \$500 million to gymnasts abused by Larry Nassar.¹⁶⁸

Additionally, schools with powerhouse programs make millions from their athletic programs—dependent on winning seasons and retaining big-name staff.¹⁶⁹ So, the loss of an athlete or coach, in addition to the negative media attention, could have serious financial implications for the school as well. As one survivor noted, while a school "talk[s] about having a zero-tolerance policy" for sexual violence, "often it comes down to wanting to protect your own image, which comes back to money. And then also to winning, which in turn also comes back to money."¹⁷⁰ Therefore, schools have financial incentive to shield athletics personnel from misconduct allegations to protect their own brand.¹⁷¹

In the age of NIL, institutions have more motivation to protect athletics personnel accused of violence. Athletes receive more media attention, which provides more awareness of schools themselves.¹⁷² For

¹⁶³ Lavigne & Noren, *supra* note 36.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Jessica Dickler, "Universities are Going to Continue to Suffer." *Some Colleges Struggle with Enrollment Declines, Underfunding*, CNBC (Oct. 5, 2022, 12:16 PM), <https://www.cnbc.com/2022/10/05/colleges-struggle-with-enrollment-declines-underfunding-post-covid.html>.

¹⁶⁷ *E.g.*, Berg, *supra* note 34; *More Settlements Reached Over College Athlete Sex Abuse Scandals*, *supra* note 35.

¹⁶⁸ Berg, *supra* note 34.

¹⁶⁹ See Kelly, *supra* note 10, at 802–03.

¹⁷⁰ Fagan, *supra* note 26.

¹⁷¹ Kelly, *supra* note 10, at 802–03.

¹⁷² See Feinswog, *supra* note 33.

example, as Olivia Dunne's online followers learned of her status as a gymnast at Louisiana State University, they began watching gymnastics meets.¹⁷³ Additionally, media outlets often announce NIL deals and almost always include the applicable school.¹⁷⁴ Further, announcing large deals for athletes can be utilized as a recruiting tool for coaches,¹⁷⁵ bringing more talented athletes to the school to build and maintain star programs that preserve athletics profits. With increased media attention for such high praises, one can only imagine the heightened scrutiny and criticism that would follow a sexual assault claim against a star athlete with millions of dollars in NIL deals. As a result, NIL exacerbates the celebrity culture of athletics and provides further motivation for schools to conceal sexual assault allegations as their profits rise alongside their athletes' status.

III. PROPOSED SOLUTIONS

Because school disciplinary proceedings are often messy and ineffective,¹⁷⁶ reforms should target institutional processes. The Department of Education recently released a notice of proposed rulemaking, altering the current Title IX regulations.¹⁷⁷ The proposed rules make significant changes to how sexual assault complaints are processed,¹⁷⁸

¹⁷³ *Id.*

¹⁷⁴ *E.g.*, Conchita Widjojo, *Men's and Women's Fashion NIL Deals in March Madness 2022 So Far*, WOMEN'S WEAR DAILY (Apr. 1, 2022, 11:26 AM), <https://wwd.com/fashion-news/fashion-scoops/mens-womens-fashion-nil-deals-march-madness-2022-so-far-1235147947/>; Grobeck, *supra* note 154.

¹⁷⁵ Alex Scarborough, *Alabama Crimson Tide QB Bryce Young Has Already Signed More Than \$800k in NIL Deals*, ESPN (July 29, 2021), https://www.espn.com/college-football/story/_/id/31911674/sources-alabama-crimson-tide-qb-bryce-young-already-signed-800k-nil-deals.

¹⁷⁶ *See Critics Say Campus Sex Assault Rules Fall Short and Need an Overhaul*, NPR (June 17, 2022, 4:39 AM), <https://www.npr.org/2022/06/17/1105791440/critics-say-campus-sex-assault-rules-fall-short-and-need-an-overhaul>.

¹⁷⁷ *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, DEP'T OF EDUC. (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.

¹⁷⁸ Notably, the proposed rules allow institutions to use the single-investigator model, where the Title IX Coordinator or investigator also serve as the decision-maker. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,466 (proposed July 7, 2022) (to be codified at 34 C.F.R. pt. 106). Additionally, the rules require institutions to use the "preponderance of the evidence" standard for all adjudications and expand what personnel are considered

and, if passed, force universities to alter their procedures for a second time in less than five years.¹⁷⁹ However, the processes should not keep changing.¹⁸⁰ Instead, the Department of Education should make the current process better. As such, while there are numerous ways to make the current regulations better, this article proposes two changes to increase institutional transparency and accountability while processing reports within the current framework: (1) require colleges and universities to use a legal team to fully process all sexual assault complaints, and (2) impose a three-strikes policy against universities for Title IX violations pertaining to sexual assault reports.

A. *The Legal Team*

The 2020 Title IX regulations effectively make grievance procedures "into quasi-criminal legal trials."¹⁸¹ Because of this, unless college professors and staff have a law degree or are licensed attorneys, it is unlikely that these employees have the requisite training to be effective advisors throughout the grievance process.¹⁸² These guidelines use specific legal terms, such as "relevance" and "exculpatory evidence," that are easily misunderstood,¹⁸³ which could lead to unfair outcomes if a party's advisor is unfamiliar with the correct application or meaning of the legal term.¹⁸⁴ Further, even with a correct understanding of legal terms, most college staff are unfamiliar with the process

mandatory reporters, among other changes that will be discussed further below. *Id.* at 41,436–37, 41,483.

¹⁷⁹ See All Things Considered, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR, <https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules> (last updated Mar. 10, 2021, 5:27 PM); Tyler Kingkade, *Biden Admin Proposes Sweeping Changes to Title IX to Undo Trump-Era Rules*, NBC NEWS (June 23, 2022, 11:01 AM), <https://www.nbcnews.com/politics/biden-admin-proposes-sweeping-changes-title-ix-undo-trump-era-rules-rcna34915>.

¹⁸⁰ In fact, one advocacy organization posits that it is unlikely the Department of Education has collected enough data to justify the current overhaul of Title IX given that most students have not been on college campuses since the enactment of the 2020 regulations due to the Coronavirus pandemic. Katherine Knott, *New Title IX Rules Get 235,000 Comments*, INSIDE HIGHER ED (Sept. 14, 2022), <https://www.insidehighered.com/news/2022/09/14/thousands-weigh-new-title-ix-rules>.

¹⁸¹ Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 414 (2021).

¹⁸² See *id.* at 414–15.

¹⁸³ *Id.* at 382, 414–15; 34 C.F.R. § 106.45(b)(1)(ii)–(iii).

¹⁸⁴ *Id.* at 415.

of cross-examination.¹⁸⁵ An advisor's ability to cross-examine a witness could greatly influence a decision-maker, further demonstrating the need for trained practitioners in such delicate circumstances. Although the 2022 proposed regulations do not require a live hearing, they still demand an opportunity to assess witness credibility.¹⁸⁶ The new regulations include answering questions from the decision-maker at a minimum for credibility assessments,¹⁸⁷ effectively allowing the decision-maker to cross-examine a party. Although this credibility assessment may not be as intimidating to a complainant, it does not guarantee that the decision-maker will fully evaluate the party's trustworthiness without adequate experience in this exercise.

Therefore, to avoid the outlined issues, sexual assault complaints should be processed by legal professionals to ensure a fair proceeding and fair outcome for both the accused and accuser. As such, the regulations should be revised to require a legal team to fully process all sexual assault complaints. The team would require a minimum of four attorneys: (1) an investigator, (2) a decision-maker, (3) a respondent's attorney, and (4) a complainant's attorney. Institutions would also be free to hire additional attorneys for multiple teams if the need arises. Further, the attorneys cannot be college employees. Rather, they must be outside counsel and effectively serve as independent contractors. The legal team could be formed in one of two ways: (1) the institution could contract with specific attorneys for each position, or (2) the institution could form an equivalent to a court-appointed list, pre-approving local attorneys that are willing to learn the law and take such cases. The college would then contact four attorneys from their list for each received complaint and allow the attorneys to take over the case once the requisite team is formed. Such attorneys could be active members of the bar or retired practitioners. The regulation should be revised to include the minimum requirements for a legal team and grant institutions the power to form such teams in a manner that works best for them.

¹⁸⁵ See Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED (Nov. 20, 2018), <https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say>.

¹⁸⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,502 (proposed July 7, 2022) (to be codified at 34 C.F.R. pt. 106).

¹⁸⁷ *Id.*

The legal team requirement could be implemented without excessive burdens. The 2020 regulations and 2022 proposed regulations contemplate the use of attorneys in the grievance process,¹⁸⁸ and some institutions hired outside counsel to conduct investigations prior to the rule change.¹⁸⁹ Additionally, some authors recognize that complainants or respondents should have attorneys present during the adjudicatory process.¹⁹⁰ Using unaffiliated attorneys throughout the process ensures parties are aware of their rights, available resources, and potential consequences of any decision.¹⁹¹ The formation of an objective legal team also eliminates bias towards athletes and administrators because the lawyers would not have the same investment or incentive to protect athletics personnel.¹⁹² Further, it promotes equal representation by the parties rather than allowing the athletic department to furnish a top attorney for an accused athlete while the complainant may not be able to retain one.¹⁹³ Also, numerous attorneys already possess the required skills to conduct the prescribed grievance procedures. Many practicing lawyers, especially litigators, understand how to cross-examine witnesses, weigh evidence and credibility, and conduct investigations.¹⁹⁴ Therefore, attorneys, as skilled practitioners, are best qualified to handle such delicate proceedings, particularly under the current guidelines.

¹⁸⁸ *Id.* at 41,496.

¹⁸⁹ See, e.g., Gina Randazzo, *One of Three Title IX Cases Filed Against Same Individual Alleges Non-Consensual Oral Sex, Investigator Denies Misconduct in All*, MUSTANG NEWS (May 16, 2018), <https://mustangnews.net/one-of-three-title-ix-cases-filed-against-same-individual-alleges-non-consensual-oral-sex-investigator-denies-misconduct-in-all/>.

¹⁹⁰ E.g., Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293 (2017) (advocating for victims' attorneys to restore victim choice throughout all stages of the proceeding); Ellen L. Mossman, Comment, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585 (2012) (discussing a need for counsel when a student faces both disciplinary and criminal proceedings for on-campus conduct).

¹⁹¹ Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM 123, 144–63 (2017); see Mossman, *supra* note 190, at 618–22.

¹⁹² See Kelly, *supra* note 10, at 802–03.

¹⁹³ See Jake New, *Pro Bono*, INSIDE HIGHER ED (July 7, 2016), <https://www.insidehighered.com/news/2016/07/07/ncaa-rules-allow-boosters-help-athletes-accused-sexual-assault>; Lavigne, *supra* note 39.

¹⁹⁴ See *Career Skills Required for a Civil Litigation Lawyer*, SKILLSYOU NEED, <https://www.skillsyouneed.com/rhubarb/civil-litigation-lawyer.html> (last visited Dec. 31, 2022).

Despite its clear advantages, this approach may be criticized by some for its potential to increase costs. In fact, the 2022 proposed regulations aim to save institutions millions across the next decade.¹⁹⁵ However, instead of looking to cut costs, the Department of Education should invest in better processes in order to achieve fairer results by providing funding to cover at least partial costs associated with the creation of a sexual assault legal team. Increased funding allows schools to provide better services to students in the most traumatic time of their lives, and an effective process would increase accountability and transparency at the institutional level.¹⁹⁶

Others may criticize the legal team approach because such a formal process with cross-examination could dissuade some survivors from reporting their assault.¹⁹⁷ This author recognizes the difficulty in telling one's assault story regardless of who it is told to. However, using attorneys may encourage students to report assaults since the institution is not involved, and they are more likely to receive a fair proceeding.¹⁹⁸ Further, attorneys are bound by a code of ethics.¹⁹⁹ Their obligations include abiding by a client's decision for how to handle a case,²⁰⁰ acting diligently in the representation of a client,²⁰¹ and maintaining confidentiality.²⁰² Therefore, the ethical obligations of attorneys provide a safe environment for a complainant and respondent to share their stories, which could encourage reporting.²⁰³ Further,

¹⁹⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,391 (proposed July 7, 2022) (to be codified at 34 C.F.R. pt. 106).

¹⁹⁶ *Contra* discussion *supra* Section II.B.

¹⁹⁷ See, e.g., *Critics Say Campus Sex Assault Rules Fall Short and Need an Overhaul*, *supra* note 176; R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

¹⁹⁸ See Weiner, *supra* note 191, at 144–63; *contra* Kelly, *supra* note 10, at 802–04.

¹⁹⁹ See *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Dec. 31, 2022).

²⁰⁰ MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

²⁰¹ MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

²⁰² MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

²⁰³ See Weiner, *supra* note 191, at 158–63; *contra* Denise-Marie Ordway, *Why Many Sexual Assault Survivors May Not Come Forward for Years*, JOURNALIST'S RES. (Oct. 5, 2018), <https://journalistsresource.org/health/sexual-assault-report-why-research/> (citing Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157 (2006)).

because the existing Title IX grievance process mirrors a criminal proceeding,²⁰⁴ if equitable outcomes at the university level are shown to be possible, such an approach may encourage survivors to believe in the criminal justice system and move forward with charges against their assailant.

Therefore, despite potential criticisms, requiring a legal team to process all sexual assault reports is a viable option to increase institutional accountability for athletics personnel accused of sexual misconduct. Using outside attorneys ensures equal representation for both the complainant and respondent, eradicates institutional bias during the investigation, and protects fairness throughout the process.

B. A Three-Strikes System

Additionally, to preserve procedural integrity, the Department of Education needs a system to check institutional compliance. As such, the Department of Education should issue a new regulation imposing a three-strikes system against colleges and universities. The regulation would demand that the Department withdraw applicable federal funding from a college or university after the third finding of a Title IX violation in handling a sexual assault complaint. Qualifying violations would include, but may not be limited to, failing to report a received complaint, a college employee that is a licensed attorney serving in any capacity in the grievance process (if the proposal above is also adopted), or refusing to impose recommended sanctions on a person found responsible of committing sexual assault.²⁰⁵

Institutions are required to respond to actual notice of sexual assault allegations,²⁰⁶ and failing to do so violates Title IX.²⁰⁷ If a school violates Title IX, the complainant or anyone with knowledge of the violation can file a complaint with the Office for Civil Rights alleging the institution discriminated against a person on the basis of sex.²⁰⁸ The OCR will then evaluate the complaint, investigate if able, and either enter a voluntary resolution agreement or "initiate administrative enforcement proceedings, or refer the case to the Department

²⁰⁴ See Mann, *supra* note 181, at 414.

²⁰⁵ See discussion *supra* Sections II.C, III.A.

²⁰⁶ 34 C.F.R. § 106.44(a) (2022).

²⁰⁷ See *id.*; see also 34 C.F.R. § 106.1 (2022).

²⁰⁸ About OCR, *supra* note 41.

of Justice for judicial proceedings."²⁰⁹ In fact, as of December 2, 2022, there are currently 183 ongoing, post-secondary institution investigations for Title IX violations specifically pertaining to sexual violence.²¹⁰ If an agreement cannot be reached to institute compliance, federal funds may be withdrawn from the institution after a formal process is complete.²¹¹

The three-strikes system provides incentive for institutions to ensure a full, fair process to all parties. Colleges have previously shielded coaches and players to save their image and athletic programs.²¹² Therefore, schools should have funds invested in the grievance process to ensure compliance. Institutions currently have little to no reason to fear investigations by the Office for Civil Rights because the Department of Education has never pulled federal funding for Title IX violations.²¹³ However, a three-strikes policy *mandates* funding withdrawal. As a result, schools would be motivated to comply with Title IX processes to secure their own funding. A reliable grievance process benefits reporting students as it promises a response, and it helps prevent future assaults by providing proof of real accountability.²¹⁴ If schools face accountability for their system's failures, they would be more likely to hold responsible individuals accountable. Additionally, this process would likely reduce the number of schools under investigation for Title IX violations given the tremendous incentive to follow the regulations, allowing Department resources to be directed into better programs and opportunities for college students.

IV. CONCLUSION

In sum, institutions struggle to impose accountability on both athletes and athletics officials accused of sexual misconduct. Schools have ignored complaints, dismissed allegations, and slighted

²⁰⁹ DEP'T OF EDUC., COMPLAINT PROCESSING PROCEDURES 1–3 (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf>.

²¹⁰ *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of December 2, 2022 7:30am Search*, DEP'T OF EDUC. OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html#> (last modified Dec. 6, 2022).

²¹¹ *See* 20 U.S.C. § 1682; 34 C.F.R. § 106.1.

²¹² *E.g.*, Bennett, *supra* note 66; Hernandez, *supra* note 8, at 164–65; Kelly, *supra* note 10, at 802–04; Fagan, *supra* note 26.

²¹³ Meyer, *supra* note 23, at 364.

²¹⁴ *Cf.* discussion *supra* Section II.B.

investigations in favor of the accused.²¹⁵ Although colleges and universities must respond to an allegation of sexual misconduct when they receive actual knowledge of the incident,²¹⁶ there are few meaningful repercussions for procedural misconduct as the Department of Education has never pulled federal funding from an institution for noncompliance with Title IX.²¹⁷

With the increasing celebrity status of athletes and coaches and the addition of NIL, schools have more incentive than ever to shield athletics personnel from misconduct proceedings.²¹⁸ In order to combat institutional biases in complaint processing, the Department of Education should make the current grievance procedures better by allowing trained attorneys to process all sexual assault complaints and create a three-strikes system to check institutional compliance with Title IX.²¹⁹ Although these proposals create a more stringent process with harsh penalties, structure ensures accountability. Otherwise, schools may continue protecting athletes and athletics personnel at the cost of a survivor's trauma. The culture must change in college athletics, and the time for that change is now.

²¹⁵ *See id.*

²¹⁶ 34 C.F.R. § 106.44(a) (2022).

²¹⁷ Meyer, *supra* note 23, at 364.

²¹⁸ *See* discussion *supra* Section II.D.

²¹⁹ *See* discussion *supra* Section III.